TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 190

CLARENCE H. VENNER, APPELLANT,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

FILED OCTOBER 20, 1924

(30,666)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 21, 1925

[fols. 1-3] CAPTION—Omitted

[fol. 4] STATE OF OHIO,
Cuyahoga County, ss:

IN COURT OF COMMON PLEAS

No. 205,550

CLARENCE H. VENNER, 50 Broad Street, New York City, Plaintiff,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Columbia Bldg., Cleveland, Ohio, Defendant

Injunction and Relief

PETITION AND PRAECIPE FOR SUMMONS—Filed in District Court Jan. 5, 1923; in Common Pleas Court, Nov. 9, 1922

Be it remembered that heretofore, to-wit: at a term of said Court of Common Pleas, begun and held at the Court House in the City of Cleveland, within and for the County of Cuyahoga and State of Ohio, on the 5th day of September in the year of Our Lord One Thousand Nine Hundred and Twenty, before their Honors; Samuel E. Kramer, Dan B. Cull, Thomas M. Kennedy, Maurice Bernon, Frank Phillips, Alvin Pearson, Manuel Levine, William B. Neff, Frederick P. Walther, Homer G. Powell, George P. Baer, and Florence E. Allen, Judges of the Court of Common Pleas, of the Eleventh Judicial District of the State of Ohio. And thereupon, on the 9th day of November, A. D. 1922, there was duly filed in the Court of Common Pleas, No. —, a certain petition, which is in the words and figures following, to-wit:

CLARENCE H. VENNER, 50 Broad Street, New York City, Plaintiff,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Columbia Building, Cleveland, Ohio, Defendant

[fol. 5] Petition for Injunction and Equitable Relief

Plaintiff is a citizen and resident of the State and City of New York, and says the defendant, The Michigan Central Railroad Company, is a corporation organized and existing under the laws of the State of Michigan, by virtue of certificate of incorporation duly filed in the office of the Secretary of the State of Michigan on December 30, 1922; that said company now has an outstanding capital stock (all of one class) aggregating $18,736,400, divided into shares

of the par value of $100 each; that for many years past $16,819,300 of the capital stock of the defendant Company has been owned by The New York Central and Hudson River Railroad Company, and its successors, by consolidation The New York Central Railroad Company, which still holds the same, and dominates and controls the said Michigan Central Railroad Company, a majority of whose directors are directors of The New York Central Railroad Company, and Alfred H. Smith, A. H. Harris, and E. F. Stephenson are respectively the president, vice president and secretary of the defendant company as well as of The New York Central Railroad Company, and The Cleveland Cincinnati, Chicago & St. Louis Railway Company. Plaintiff says that since November 1904, the firm of C. H. Venner & Co., has been and now is the holder and owner of record on the books of said defendant, of One Hundred and Seventy (170) shares of the capital stock of the defendant company, of the par value of $100 each; that the plaintiff is now and for more than ten years past has been the sole member of said firm and no other person has any interest therein. Under date of September 1, 1922, said defendant together with The New York Central Railroad Co., and The Cleveland, Cincinnati Chicago & St. Louis Railway Company, as the self styled New York Central Lines, intend to enter into a so-called Equipment Trust Agreement with Guaranty Trust Com- [fol. 6] pany of New York, pursuant to which said Trust Company acts as Trustee of the so-called "New York Central Lines Equipment Trust of 1922" to issue under the terms of said agreement so called "Four and One-Half per cent" Equipment Trust Gold Certificates in a total amount of $12,660,000, with dividend warrants payable semi-annually. September 1 and March 1, and principal maturing serially in fifteen equal annual instalments, payable September 1, of each year from 1923, to 1937, both inclusive. The proceeds of said certificates are to cover seventy five per cent of the costs of 190 Mikado freight locomotives, Class H-10 and 50 Pacific Type Passenger locomotives, title to which is to be vested in said Trustee and said equipment leased by it to said Railroad Companies, which are themselves to pay the remaining twenty five per cent of such cost. The directors of the defendant at a meeting held on October 11, 1922, authorized the President or any Vice President of the defendant, to execute said Equipment Trust Agreement. Plaintiff alleges that a large part of the equipment, costing $16,915,000,00, to be leased under said agreement, and for which the trust certificates are to be issued as aforesaid, is for th- use and benefit of, and upon the payment of said certificates is to become the property of the corporations, parties to said agreement other than the defendant Michigan Central Company; that of said $16,915,000 of equipment $11,384,000, thereof shall become the property of The New York Central Railroad Company; $4,505,000 thereof, the property of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; and $1,026,000, thereof, the property of the defendant; that The New York Central Railroad Company, will become the owner of 130 of said Mikado freight locomotives, The Cleveland Cincinnati Chicago & St. Louis Railway Company, of 50 of said Mikado freight locomo-

tives; and the defendant of 10 of said Mikado f-eight locomotives; that the New York Central Railroad Company will become the [fol. 7] owner *will become the owner* of 30 of said Pacific Type Passenger locomotives; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, of 15 of said Pacific type passenger locomotives; and the defendant of 5 of said Pacific type passenger locomotives; that the defendant Michigan Central Company, owns none of the capital stock of The New York Central Railroad Company, or of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and is in no wise interested in maintaining the credit of either of said Railroad corporations; and that each and all of said Railroad corporations have sufficient credit and financial standing in the money centers of the United States to enable them to sell Equipment Trust Certificates issued to purchase on credit all the equipment necessary for their respective operations without entering into a joint and several guaranty to pay the obligations of several other corporations by way of rental or otherwise, under a joint and several Equipment Trust Agreement; that under and pursuant to said Trust Agreement, all of the railroads jointly and severally covenant to pay rentals sufficient to pay said certificates and divided warrants as they mature, and divers other fixed charges. Plaintiff alleges that the defendant operates lines of railroad in the States of Michigan, Ohio, Indiana, Illinois, and New York and in the Dominion of Canada; that The New York Central Railroad Company operates lines of railroad, in New York, New Jersey, Massachusetts, Pennsylvania, Ohio, Indiana, Illinois and Michigan and the Dominion of Canada, That The Cleveland, Cincinnati, Chicago, St. Louis Railway Company operates lines of railway in the States of Ohio, Indiana, Illinois, and Michigan, that the lines of railway of the defendant and the other two companies, above named, are competing lines each with the other, some of the lines of said company, being parallel with the lines of the other company, or companies; that under said purchasing and leasing plan, defendant purposes to acquire a large [fol. 83] part of said equipment and to use some or all of the same in the State of Ohio, and that other portions of said equipment will be similarly acquired by said other Railroad Companies, and be used by them within and without the State of Ohio, over and in connection with the competing lines, as aforesaid. Plaintiff further says that the defendant's joinder, as aforesaid, with the said other railroad Companies in said joint and several covenant will operate as a pledging and lending of defendant's credit to such other railroad companies, to said Trust Company, and to the holders of said certificates, contrary to law, the charter of said defendant, and to the statute and other public laws of the States of Ohio, Michigan governing railroad corporations, the purpose and effect of said plan and agreement being the unlawful assumption by defendant without any corporation power or authority on its part so to do, of an obligation of suretyship, the guaranty of said other Railroad Companies, in respect to the payment of rentals for the equipment leased to said other Railroad Companies Respectively, and in respect of the joint and several liability of defendant, and said other railroad companies,

directly or indirectly, to pay said certificates and dividend warrants as they mature. Plaintiff alleges that none of said $12,660,000 of Equipment Trust Certificates above described have not yet been issued or are outstanding, but that J. P. Morgan and Company, a firm of bankers doing business in the City of New York, and acting as agents, for the defendant, and the other companies parties to said Trust Agreement are offering said certificates for sale, and are publicly announcing that the same will be offered for sale subject to future delivery that defendant and the other corporations are proposing to sell to or through said J. P. Morgan and Company, said Equipment Trust Certificates upon a basis of about ninety five per cent of the par amount thereof, and said J. P. Morgan and Company, [fol. 9] will in turn sell them or deliver them to the public, first issuing temporary or interim certificates, and thereafter the final certificates Plaintiff says he brings this action as a minority stockholders of defendant as aforesaid, in behalf of himself and of others similarly situated, who may join in the prayer of this petition, and the expenses of this action to prevent and stop the said unlawful purposes and plans; that it is useless and vain for plaintiff to seek this end within the defendant corporation; that plaintiff is without remedy at law and any other relief except in equity, and defendant, will, unless enjoined proceed to carry out the unlawful agreements, purposes and acts aforesaid, to plaintiff's irreparable damage. Wherefore, plaintiff prays that upon the filing of this petition a temporary restraining order issue to restrain and enjoin the defendant from carrying out said Equipment Trust Agreement, and from enjoining with any other of said railroad companies in a covenent jointly and severally to pay rentals sufficient to pay the certificates and dividend warrants, aforesaid, as they mature, and generally from pledging or lending its credit to such other railroad companies said Guaranty Trust Company, or the holder or holders of any of said certificates, in respect to said Equipment Trust Agreement, said New York Central Lines Four and one-half per cent equipment Trust of 1922, or the issuance of said Four and One-Half Per Cent Equipment Trust Gold certificates, and upon final hearing for a permanent injunction to the same effect; also, that any and all of said equipment trust certificates, that may be issued pending this action and the agreement securing them be adjudged and decreed to be void and without binding obligation upon said defendant and for all such other and further relief as plaintiff may be entitled to in the premises.

(Signed) Snyder, Henry, Thomsen, Ford and Seagrave,
Plaintiff's Attorneys.

[fol. 10] Sworn to by Clarence H. Venner. Jurat omitted in printing.

IN COURT OF COMMON PLEAS

[Title omitted]

PRECIPE FOR SUMMONS

To the Clerk:

Please issue summons to the Sheriff of Cuyahoga County, for the within named defendant, returnable according to law. Endorse thereon: "Petition for Injunction and Equitable Relief."

(Signed) Snyder, Henry, Thomsen, Ford & Seagrave, Plaintiff's Attorneys.

[File endorsement omitted.]

IN COURT OF COMMON PLEAS

SUMMONS AND SHERIFF'S RETURN—Filed Nov. 9, 1922

THE STATE OF OHIO,
Cuyahoga County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify the Michigan Central Railroad Company, that it has been sued by Clarence H. Venner, in the Court of Common Pleas of Cuyahoga County and that unless, it answer by [fol. 11] the 9th day of December, A. D. 1922, the petition of the said plaintiff, against it filed in the Clerk's office of said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 20th day of November, A. D. 1922.

Witness, George Wallace, Clerk of said Court, and the seal thereof, at the city of Cleveland this 9th day of November A. D. 1922.

George Wallace, Clerk, by H. L. Nicholas, Deputy Clerk.
(Seal.)

THE STATE OF OHIO,
Cuyahoga County, ss:

I served this writ on the within named on the 13th day of November, 1922. I served this writ on the within named The Michigan Central Railroad Co. by delivering a true and certified copy thereof with all the endorsements thereon to J. M. White, Regular Ticket Agent of said Co., the president or other officer of said Co., not found in my county.

Sheriff's fees, $.91.

C. B. Stannard, Sheriff, by Chalmer Grimm, Deputy.

[File endorsement omitted.]

IN COURT OF COMMON PLEAS

[Title omitted]

PETITION FOR REMOVAL—Filed Dec. 8, 1922

Now comes The Michigan Central Railroad Company, defendant herein, appearing specially for the purpose of this petition only and respectfully shows to the Court that this is a suit of a civil nature in equity and that the matter or amount in dispute exceeds the sum or value of $3,000.00, exclusive of interest and costs. The controversy [fol. 12] herein and every issue of fact and law involved is wholly between citizens of different states. The plaintiff, Clarence H. Venner, is now and was at the time of the filing of the petition herein a citizen and resident of the State of New York, and your petitioner, the defendant herein, was then and still is a corporation organized under the laws of Michigan, and a citizen and resident of that state, having its principal place of business at Detroit, Michigan. That the time within which your petitioner, as such defendant, is required to answer or plead to said petition has not yet expired until December 9, 1922, and your petitioner has not yet filed any pleadings or in any way appeared herein. Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases that it will enter in the United States District Court for the Northern District of Ohio, Eastern Division, within thirty days from the filing of this petition, a certified copy of the record in this suit, and for the payment of all costs which shall be awarded by the said court, if the said District Court shall hold that this suit was wrongfully or improperly removed thereto. Your petitioner therefore prays that this Court proceed no further herein except to make the order of removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court as provided by law.

The Michigan Central Railroad Company, by S. H. West, Its Attorneys.

Sworn to by S. H. West. Jurat omitted in printing.

[fol. 13] BOND ON REMOVAL FOR $500.00—Approved and filed Dec. 8, 1922; omitted in printing

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[fol 14] IN COURT OF COMMON PLEAS

[Title omitted]

NOTICE OF PETITION FOR REMOVAL—Filed Dec. 8, 1922

To Snyder, Henry, Thomsen, Ford & Seagrave, Attorneys for Plaintiff:

Please take notice that the defendant herein will on the 8th day of December, 1922, at 9:30 o'clock A. M., or as soon thereafter

as counsel can be heard move the Court for an order removing said cause to the District Court of the United States for the Northern District of Ohio, Eastern Division, in accordance with the petition and bond of the defendant, copies of which are hereto attached.

(Signed) S. H. West, Attorney for Defendant.

Service of above notice with copies of petition and bond is hereby acknowledged this 7th day of December, 1922.

(Signed) Snyder, Henry, Thomsen, Ford & Seagrave, Attorneys for Plaintiff.

[File endorsement omitted.]

IN COURT OF COMMON PLEAS

[Title omitted]

ORDER REMOVING CAUSE—Dec. 8, 1922

This cause coming on for hearing upon petition and bond of defendant, herein for an order transferring this cause to the United States District Court for the Northern District of Ohio, Eastern Division, and it appearing to the Court that the defendant has filed [fol. 15] its petition for such removal in due form of law with its bond duly conditioned, with good and sufficient surities as provided by law, and that defendant has given plaintiff due notice thereof and of this hearing and that this is a proper cause for removal to said District Court, now, therefore, said petition and bond are hereby accepted and it is hereby ordered, and adjudged that this cause be and it is hereby removed to the United States District Court for the Northern District of Ohio, Eastern Division and the Clerk is hereby directed to make up the record in said cause for transmission to said Court, forthwith.

Plaintiff's costs in this action are taxed as follows: $3.86.

Defendant's costs in this action are taxed as follows: 7.60.

IN COMMON PLEAS COURT

CLERK'S CERTIFICATE

I, George Wallace, Clerk of the Court of Common Pleas, within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the Laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the records 1159 Page 178 of the proceedings of the Court of Common Pleas, within and for said Cuyahoga County, and that said foregoing copy has been compared by me, with the original record and that the same is a correct transcript thereof.

In testimony whereof, I do hereby subscribe my name officially, and affix the Seal of said Court at the Court House in the City of Cleveland, in said County, this 5th day of January A. D. 1923.

George Wallace, Clerk. (Seal.)

[fol. 16] IN COMMON PLEAS COURT

JUDGE'S CERTIFICATE TO CLERK

I, A. J. Pearson Presiding Judge of the Court of Common Pleas, within and for the Eleventh Judicial District of the State of Ohio, in which District is said County of Cuyahoga, do hereby certify, that George Wallace was at the date of the above certificate, and now is, Clerk of said Court of Common Pleas, with and for said Cuyahoga County, and State of Ohio, and that said Clerk is the officer in whose custody said original record 1159 Page 178 is required to be kept by the Laws of the State of Ohio, and authorized by the Laws of the State of Ohio, to certify as aforesaid, and that said attestation to said copy of said record is in due form of Law.

Signed by me and dated at Cleveland, Cuyahoga County, Ohio, this 5th day of January A. D. 1923.

A. J. Pearson, Judge as Aforesaid.

IN COMMON PLEAS COURT

CLERK'S CERTIFICATE TO JUDGE

I, George Wallace Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, do hereby certify that A. J. Pearson was at the date of *of* the foregoing certificate the duly elected, qualified and acting Presiding Judge of the Court of Common Pleas of Cuyahoga County.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at Cleveland, this 5th day of January A. D. 1923.

George Wallace, Clerk. (Seal.)

[fol. 17] In United States District Court for the Northern District of Ohio, Eastern Division

No. 11764

Clarence H. Venner, Plaintiff,

v.

The Michigan Central Railroad Company, Defendant

Motion to Remand and Order Overruling Same—Filed Jan. 31, 1923

The plaintiff, appearing in this court for the purposes of this motion only, moves that this cause be remanded to the Court of Common Pleas of Cuyahoga County, Ohio, from which court it has been removed on petition of the defendant; and expressly denies that this court has jurisdiction of this cause or of the plaintiff herein. For ground of said motion, plaintiff says that he is a resident and citizen of the State of New York, and the defendant is a corporation organized under the laws of Michigan; that while there is diversity of citizenship by reason of these facts, nevertheless this District Court has no jurisdiction of the within cause by virtue of the fact that neither plaintiff nor defendant herein are residents or citizens of this Federal District, as required by the well established law in this type of cases.

Since there is no residence nor citizenship within this District, on the part of either of the parties to the within action, the removal was erroneously made, and the cause should be remanded.

Snyder, Henry, Thomsen, Ford & Seagrave, Plaintiff's Attorneys.

Motion to remand overruled; exception noted.

This is an equity cause and order transferring it to the equity side [fol. 18] of court and docketing it, should be entered.

D. C. Westenhaver, Judge.

Feb. 27/23.

To S. H. West, Attorney for Defendant:

Please take notice that the defendant herein will, on the — day of ——, 1923, at 9:30 o'clock a. m., or as soon thereafter as counsel can be heard, move the court for an order to remand said cause to the Court of Common Pleas of Cuyahoga County from which it was removed.

Snyder, Henry, Thomsen, Ford & Seagrave, Plaintiff's Attorneys.

Service of the above notice, with copy of motion, is hereby acknowledged this 31 day of Jan'y, 1923.

S. H. West, Attorney for Defendant.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 2, 1923

Defendant answers the petition herein as follows:

1

It admits the averments thereof, except the following: It denies that C. H. Venner & Co., or the plaintiff, is the owner of any of the shares of its capital stock and that this action is brought by the plaintiff as such stockholder in behalf of himself and other stockholders of the defendant. It denies that said The New York Central Railroad Company dominates or control- the defendant in respect to entering into the said equipment trust agreement or lease thereunder, and that defendant is not interested in the credit and financial standing of said The New York Central Railroad Company or said The Cleveland, Cincinnati, Chicago & St. Louis Railway Company. And that defendant's lines of railroad and the lines of said other companies are parallel to or compete with each other. It denies that its joinder with said other railroad companies in any of the covenants of said equipment trust agreement, or anything done or proposed in respect thereto, or the purchase of equipment as therein provided, will operate as a pledge or lending of defendant's credit to such other railroad companies or either of them, or to said Guaranty Trust Co., or to the holders of equipment trust certificates issued pursuant to the agreement, and that the same will be in violation of the defendant's charter or any statute or law of said states of Ohio or Michigan, and denies that the purpose or effect of said [fol. 20] proposed plan and agreement is or will be the assumption by the defendant, without corporate power or authority of law, of any obligation of guaranty or suretyship, or other obligation in respect of rentals of equipment leased to said other companies or either of them, or in respect to payment of certificates or dividend warrants thereon as they mature. It denies that none of said equipment trust certificates have been issued or are outstanding; that said J. P. Morgan & Co. are acting as agents for it and the other companies parties to said trust agreement, or will issue either temporary or final equipment trust certificates, and denies that plaintiff will or can suffer any damages in the premises, or is entitled to injunction or other equitable relief as prayed for.

2

For its second defense defendant avers that it and said The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company are severally common carriers of passengers and freight by railroad, and subject to the interstate commerce act, being carriers within the meaning of sec. 20a

said act. On or about October 12, 1922, defendant and said other ilroad companies, pursuant to the said section of said act, applied the interstate commerce commission for an order authorizing the sumption by them, jointly and severally, of the obligations and abilities in respect of said equipment trust certificates proposed to assumed and incurred under the New York Central Lines four nd one-half per cent Equipment Trust of 1922, by the execution nd delivery of said proposed equipment trust agreement to be dated eptember 1, 1922, together with a lease or leases of equipment to entered into pursuant to such agreement.

Upon receipt of such application said commission caused notice hereof to be given in the manner provided by law, whereby the ublic utilities commission and other appropriate state authorities Ohio, and other states within which said carriers operated, had ol. 21] the right and were given opportunity to make such repre- ntations as they might deem proper for preserving and conserving he rights and interests of their people and the said states respec- vely involved in such proceeding.

Thereafter, on November 8, 1922, said interstate commerce com- ission, after investigation of the purposes and uses of the proposed sue of equipment trust certificates and the proceeds thereof, and of he proposed assumption of obligations and liabilities, joint and veral, by the defendant and other carriers, in respect of said cer- ficates, duly found and determined that said proposed issue and sumption (a) was for lawful objects within the respective cor- orate purposes of the applicants and compatible with the public nterests, and which are necessary and appropriate for and con- stent with the proper performance by them of service to the public common carriers, and which will not impair their ability to per- rm that service, and (b) was reasonably necessary and appropriate r such purposes.

And thereupon said commission duly issued and entered its order, which it granted the said application and ordered that the de- ndant and said other railroad companies be authorized to assume, intly and severally, the obligations and liabilities in respect of, t exceeding $12,660,000.00, New York Central Lines four and e-half per cent equipment trust certificates of 1922, to be issued the Guaranty Trust Company of New York, by entering into an greement dated September 1, 1922, with M. S. Barger, et al., vend- s, and said Guaranty Trust Company, creating said trust and pro- ding for the issue of said certificates with dividend warrants at- ched, and into a lease or leases of the trust equipment with said uaranty Trust Company, thereby agreeing to pay rent sufficient pay the principal of said certificates, the dividends thereon and rtain other charges, said agreement and lease or leases to be sub- antially in the forms set forth in the application; and said certifi- tes to be sold at not less than 95% of par and accrued dividends, d the entire proceeds thereof used in the procurement of said uipment.

ol. 22] Said order of said commission was made under and in nformity with the provisions of said sec. 20a of said interstate

commerce act, and has since remained and is now in full force and effect.

Defendant avers that by the provisions of said sec. 20a of said act and of said order of said interstate commerce commission power has been conferred upon it and said other carriers, and it and they have the power to assume the obligations and liabilities aforesaid, irrespective of whether, in the absence of said federal legislation, power in that behalf had or had not been conferred upon it or them by the law of the State of Ohio, or any other state.

3

For its further defense defendant reaffirms and adopts the averments contained in paragraph 2 hereof, to and including the words "and has since remained and is now in full force and effect," as fully as if here rewritten at length; and further avers that this court is without jurisdiction to entertain this action, in which it is sought to enjoin the defendant from carrying out the terms and provisions of said order and availing itself of the authority thereof, inasmuch as the Court of Common Pleas of Cuyahoga County, Ohio, had no such jurisdiction.

Wherefore defendant prays that the plaintiff's application for injunction be denied and his petition dismissed.

S. H. West, Attorney for Defendant.

Sworn to by S. H. West. Jurat omitted in printing.

[fol. 23] In United States District Court

[Title omitted]

Opinion on Motion to Remand—Filed Feb. 27, 1923

Westenhaver, District Judge:

Plaintiff, a citizen and inhabitant of New York, instituted this action against The Michigan Central Railroad Company, a citizen and inhabitant of the State of Michigan, in the Court of Common Pleas, Cuyahoga County, Ohio. Defendant removed it here on the ground alone of diversity of citizenship. Plaintiff moves to remand on the ground that this court has no jurisdiction, because neither plaintiff nor defendant is a resident or citizen of this district.

This motion to remand will be denied. The legal profession is to be congratulated that the confusion produced in the law relating to removal of causes by Ex parte Wisner, 203 U. S. 449, has at last been cleared up. In Lee v. C. & O. Ry. Co., decided by U. S. Supreme Court January 22, 1923, Ex parte Wisner is overruled. This result was already regarded as accomplished by the principles relating to the removal of causes stated in General Investment Co. v. L. S. & M. S. Ry. Co., decided by the U. S. Supreme Court November

27, 1922. These cases restore the law as it was understood prior to the decision of Ex parte Wisner; namely, that the limitations of the venue sections of the Judicial Code do not apply to the removal [fol. 24] of causes on the ground of diversity of citizenship.

This action is in equity and not at law. An order will be entered transferring it to the equity side of this court.

February 27, 1923.

D. C. Westenhaver, Judge.

[fol. 25] In United States District Court

[Title omitted]

Order Overruling Motion to Remand and Transferring Cause to Equity Docket—February 27, 1923

This day this cause came on to be heard on the motion of plaintiff to remand this cause to the Court of Common Pleas of Cuyahoga County Ohio, and was submitted to the Court, on consideration thereof the Court overruled said motion to remand, to which ruling of the Court plaintiff by his attorneys, excepts. It appearing to the Court that this case was erroneously filed on the law side of the docket, it is now ordered that it be transfered to the equity docket as case No. 841 for the reason that the relief therein prayed for is wholly equitable.

[fol. 26] In United States District Court

[Title omitted]

Order Reinstating Case and Giving Plaintiff Leave to File Amended Petition—January 29, 1924

This cause having been dropped from the trial calendar on April 28, 1923, it is, upon application to the court by the plaintiff, reinstated and plaintiff is allowed to file an amended petition instanter.

[fol. 27] In the United States District Court

[Title omitted]

Amended Petition—Filed January 29, 1924

Plaintiff is a citizen and resident of the State and City of New York, and says the defendant, The Michigan Central Railroad Company is a corporation organized and existing under the laws of the State of Michigan, by virtue of certificate of incorporation duly filed in the office of the Secretary of State of Michigan on December 30,

1901; that said company now has an outstanding capital stock (all of one class) aggregating $18,736,400, divided into shares of the par value of $100 each; that for many years past $16,819,300 of the capital stock of the defendant company has been owned by The New York Central and Hudson River Railroad Company, and its successor by consolidation, The New York Central Railroad Company, which still holds the same, and dominates and controls the said Michigan Central Railroad Company, a majority of whose directors are directors of The New York Central Railroad Company, and Alfred H. Smith, A. H. Harris and E. F. Stephenson are respectively the president, vice president and secretary of the defend-
[fol. 28] ant company, as well as of The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

Plaintiff says that since November, 1904, the firm of C. H. Venner & Company has been, and now is the holder and owner of record on the books of said defendant, of one hundred and seventy (170) shares of the capital stock of the defendant Company, of the par value of $100 each; that the plaintiff is now and for more than ten years past has been the sole member of said firm and no other person has any interest therein.

Under date of September 1, 1922, said defendant together with The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as the self-styled New York Central Lines, intend to enter into a so-called Equipment Trust Agreement with Guaranty Trust Company of New York, pursuant to which said Trust Company acts as Trustee of the so-called "New York Central Lines Equipment Trust of 1922," to issue under the terms of said agreement so-called "Four and One-half Per Cent. Equipment Trust Gold Certificates" in a total amount of $12,660,-000.00, with dividend warrants payable semi-annually, September 1, and March 1, and principal maturing serially in fifteen equal annual installments, payable September 1 of each year from 1923 to 1937, both inclusive. The proceeds of said certificates are to cover seventy-five per cent of the cost of 190 Mikado freight locomotives, Class H-10, and 50 Pacific type passenger locomotives, title to which is to be vested in said Trustee and said equipment leased by it to said Railroad Companies, which are themselves to pay the remaining twenty-five per cent of such cost.

The directors of the defendant at a meeting held on October 11, 1922, authorized the President or any Vice President of the defendant, to execute said Equipment Trust Agreement.

[fol. 29] Plaintiff alleges that a large part of the equipment costing $16,915,000.00 to be leased under said agreement, and for which the trust certificates are to be issued as aforesaid, is for the use and benefit of, and upon the payment of said certificates is to become the property of the corporations, parties to said agreement, other than the defendant Michigan Central Company; that of said $16,915,-000.00 of equipment, $11,384,000.00 thereof shall become the property of The New York Central Railroad Company; $4,505,000.00 thereof the property of The Cleveland, Cincinnati, Chicago & St.

Louis Railway Company; and $1,026,000.00 thereof the property of the defendant; that The New York Central Railroad Company will become the owner of 130 of said Mikado freight locomotives; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, of 50 of said Mikado freight locomotives; and the defendant of 10 of said Mikado freight locomotives; that The New York Central Railroad Company will become the owner of 30 of said Pacific type passenger locomotives; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company of 15 of said Pacific type passenger locomotives; and the defendant of 5 of said Pacific type passenger locomotives; that the defendant Michigan Central Company owns none of the capital stock of The New York Central Railroad Company, or of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and is in no wise interested in maintaining the credit of either of said Railroad corporations; and that each and all of said Railroad corporations have sufficient credit and financial standing in the money centers of the United States to enable them to sell Equipment Trust Certificates issued to purchase on credit all the equipment necessary for their respective operations, without entering into a joint and several guaranty to pay the obligations of several other corporations by way [fol. 30] of rental or otherwise, under a joint and several Equipment Trust Agreement; that under and pursuant to said Trust Agreement, all of the Railroads jointly and severally covenant to pay rentals sufficient to pay said certificates and dividend warrants as they mature, and divers other fixed charges, and specifically agree to pay the amount of the principal of said certificates and of the dividend warrants belonging thereto representing the interest thereon, as such certificates and warrants respectively become due and payable.

Plaintiff alleges that the defendant operates lines of railroad in the States of Michigan, Ohio, Indiana, Illinois and New York and in the Dominion of Canada; that The New York Central Railroad Company operates lines of railroad in New York, New Jersey, Massachusetts, Pennsylvania, Ohio, Indiana, Illinois and Michigan and the Dominion of Canada; that The Cleveland, Cincinnati, Chicago & St. Louis Railway Company operates lines of railway in the States of Ohio, Indiana, Illinois and Michigan; that the lines of railway of the defendant and the other two companies, above named, are competing lines each with the other, some of the lines of said company being parallel with lines of the other company or companies; that under said purchasing and leasing plan, defendant purposes to acquire a large part of said equipment and to use some or all of the same in the State of Ohio, and parts in each of the other states in which its lines are operated, and that other portions of said equipment will be similarly acquired by said other Railroad Companies and be used by them within and without the State of Ohio, over and in connection with the competing lines, as aforesaid, without however, any authority or order of the state public service, public utilities, or commerce commissions, hereinafter referred to, for the issuance of said Equipment Trust Certificates or for the doing of any of the aforesaid things, being first applied for or obtained.

[fol. 31] The issuance of said certificates and of the warrants be-

longing thereto, by said Guaranty Trust Company as Trustee of the said "New York Central Lines Equipment Trust of 1922," is undertaken by it, as aforesaid, not on its own account nor with any liability on its part to pay said certificates and warrants out of its own funds, (such personal liability of said Trust company being expressly excluded and disavowed by it), but wholly at the instance and with the authority, as well as on behalf and for the sole benefit, of the defendant company and of the other railroad companies which are associated with said defendant as parties to said trust agreement, and such issuance is, in substance and legal effect and in fact, the issuance of evidences of indebtedness by the defendant company and its said associates, by and through their agents, officers and trustee aforesaid, and is in violation of and contrary to the requirements of sundry applicable provisions of the statutes of the states of New York, Illinois, Michigan and Ohio; particularly Chapter 49, Section 55, of Cahill's Consolidated Laws of New York, concerning the Public Service Commission of that state; Chapter 111-⅔, Section 21 of Smith's Illinois Revised Statutes, concerning the Illinois Commerce Commission; Section (8161) of the Compiled Laws of Michigan, 1915, as amended by Act No. 419 of the session Laws of 1919, concerning the Michigan Public Utilities Commission; and Sections 614-53 to 614-55 of the General Code of Ohio, concerning the Public Utilities Commission of Ohio; which statutes prohibit the issuance, by a railroad corporation organized under the laws of any of such states, of stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than twelve months after date thereof, for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service within such state, without the consent, permis- [fol. 32] sion and authority of such commission by its order first duly applied for and made, fixing the amount, character and terms of such issue and the purpose to which such issue or any proceeds shall be applied, and making void all issues in contravention of such requirements, and also forbidding such railroads to apply any such issue or its proceeds to any purpose not so specified.

Plaintiff further says that defendant seeks to justify its course in entering into and making said Equipment Trust Agreement, providing for the issue of certificates as aforesaid, by virtue of an order entered by the Interstate Commerce Commission on November 8, 1922, permitting the said defendant to make said agreement and approving the same. Said order of the said Interstate Commerce Commission is claimed by the defendant to have been made under Section 20-a of the interstate commerce act known as the Federal Railroad Act of 1920, Subsection (2) of which makes it

"unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the

carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption."

and Subsection (7) of which provides that

"the jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

Plaintiff further says that the defendant claims that the above [fol. 33] quoted provisions of Section 20-a of the Federal Railroad Act of 1920 dispenses with the necessity of its obtaining the consents of the said State Commissions and furthermore that by the said order of the said Interstate Commerce Commission it was clothed with the additional corporate power to make said intercorporate guaranties and to enter into said other intercorporate relations, even though such corporate power is denied to it by the corporation laws of the states wherein it was incorporated. Plaintiff further says that said Section 20-a does not in fact take away the necessity of having the consents of said State Commission nor does it clothe the defendant company with the additional corporate power aforesaid, and that the defendant's construction to that effect is erroneous; but if in fact said Section 20-a is to be so construed as in fact to take away or attempt to take away the necessity of applying for and obtaining the consents of the said State Commissions in the premises or to clothe the defendant company with the corporate power denied and forbidden to it by the laws of said state, to do the things herein complained of, then and in either such case said Section 20-a is, in such respect, unconstitutional and void, for the reason that it violates the tenth amendment of the Constitution of the United States, providing that "the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Plaintiff further avers that the laws of the several states aforesaid are part and parcel of the contract generally existing between and among the corporation, the stockholder and the state in which the corporation is organized and that if said Subsections (2) and (7) are to be construed as defendant contends, such provisions of said Section [fol. 34] 20-a of said Interstate Commerce Act are further unconstitutional because they deprive the plaintiff as a stockholder of said defendant Railroad Company of the protection of the several states in which, and of the laws thereof under which, the said defendant company was incorporated, touching and with respect to the Equipment Trust Agreement, certificates and warrants complained of in this action, and thus deprive him of a property right without due process of law within the meaning of the Fifth Amendment of the

Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law.

Plaintiff further says that the defendant's joinder, as aforesaid, with said other Railroad Companies in said joint and several covenant, will operate as a pledging and lending of defendant's credit to such other railroad companies, to said Trust Company, and to the holders of said certificates, contrary to law, the charter of said defendant, and to the statute and other public laws of the States of Ohio and Michigan governing railroad corporations, the purpose and effect of said plan and agreement being the unlawful assumption by defendant, without any corporate power or authority on its part so to do, of an obligation of suretyship, the guaranty of said other Railroad Companies in respect to the payment of rentals for the equipment leased to said other Railroad Companies respectively, and in respect of the joint and several liability of defendant and said other railroad companies, directly or indirectly, to pay said certificates and dividend warrants as they mature.

Plaintiff alleges that none of said $12,660,000 of Equipment Trust Certificates above described have yet been issued or are outstanding, but that J. P. Morgan and Company, a firm of bankers doing business in the City of New York and acting as agents for the defendant and the other companies parties to said Trust Agreement, are offering said certificates for sale, and are publicly announcing that the same [fol. 35] will be offered for sale subject to future delivery; that defendant and the other corporations are proposing to sell to or through said J. P. Morgan and Company said Equipment Trust Certificates upon a basis of about ninety-five per cent. of the par amount thereof, and said J. P. Morgan and Company will in turn sell them or deliver them to the public, first issuing temporary or interim certificates, and thereafter the final certificates.

Plaintiff says he brings this action as a minority stockholder of defendant as aforesaid, in behalf of himself and of others similarly situated, who may join in the prayer of this petition and the expenses of this action to prevent and stop the said unlawful purposes and plans; that it is useless and vain for plaintiff to seek this end within the defendant corporation; that plaintiff is without remedy at law and any other relief except in equity, and defendant will, unless enjoined, proceed to carry out the unlawful agreements, purposes and acts aforesaid, to plaintiff's irreparable damage.

Wherefore plaintiff prays that upon the filing of this amended petition a temporary restraining order issue to restrain and enjoin the defendant from carrying out said Equipment Trust Agreement, and from joining with any other of said railroad companies in a covenant jointly and severally to pay rentals sufficient to pay the certificates and dividend warrants, aforesaid, as they mature, and generally from pledging or lending its credit to such other railroad companies, said Guaranty Trust Company, or the holder or holders of any of said certificates, in respect to said Equipment Trust Agreement, said New York Central Lines Four and one-half Per Cent. Equipment Trust of 1922, or the issuance of said Four and One-Half per Cent. Equipment Trust Gold Certificates, and upon final hearing for a per-

manent injunction to the same effect; also, that any and all of said [fol. 36] equipment trust certificates that may be issued pending this action and the agreement securing them be adjudged and decreed to be void and without binding obligation upon said defendant; and for all such other and further relief as plaintiff may be entitled to in the premises.

Frederick A. Henry, of Snyder, Henry, Thomsen, Ford & Seagrave, Plaintiff's Attorneys.

Sworn to by Clarence H. Venner. Jurat omitted in printing.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS AMENDED PETITION—Filed February 9, 1924

Defendant moves the Court to dismiss the amended petition and this suit for the following reasons, which appear upon the face of said pleading:

The Court is without jurisdiction over the subject matter of the suit; for lack of the United States, an indispensable party defendant.

S. H. West, Atty. for Dfdt.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION ON MOTION TO DISMISS—Filed May 21, 1924

WESTENHAVER, District Judge:

This suit was brought originally in the state court and removed here because of diversity of citizenship. Defendant moves to dismiss for want of jurisdiction. This motion is based on the ground that the relief sought can be granted only by annulling or enjoining authority conferred by an order of the Interstate Commerce Commission, and hence this suit is one of which a United States District Court alone has jurisdiction and must be brought against the United States and the Interstate Commerce Commission and heard by three judges, pursuant to the procedure outlined in Secs. 208 and 212, Judicial Code, and Act of October 22, 1913, abolishing the commerce court and transferring its jurisdiction to the district courts. The order in question of the Interstate Commerce Commission, was made December 8, 1922. It authorizes the acquisition by means of equipment trust certificates of certain locomotive engines jointly by the defendant and the New York Central Railroad Company and the Cleveland, [fol. 39] Cincinnati, Chicago & St. Louis Railway Company. It finds

that such acquisition and the issue of trust certificates are for lawful objects within the respective corporate purposes of the several companies and are necessary and appropriate for and consistent with the performance by them of service to the public as common carriers. Plaintiff bases his right to maintain this action on the ground that no order of the Public Utilities Commission of Ohio was obtained, authorizing the defendant to join in the joint acquisition of said locomotives and the issue of trust certificates therefor; that defendant's joint guaranty with the other two companies of the entire amount of certificates is pledging and devoting its corporate assets to ultra vires purposes; and that if Congress, by Sec. 20a, Transportation Act of 1920, intended to confer such power in disregard of the state law, such action is in violation of the Tenth Amendment to the United States Constitution.

Plaintiff sues as a minority stockholder. It does not appear that he intervened in the hearing before the Commission or has sought any relief through the Commission.

I am of opinion that the motion to dismiss for want of jurisdiction should be sustained. Plaintiff undoubtedly may maintain his action, notwithstanding he is a minority stockholder and did not intervene or seek relief through the Commission. See Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 43, 49; Skinner & Eddy Corp'n v. United States, 249 U. S. 557, 562; B. & O. R. Co., et al., v. United States, decided March 3, 1924, by U. S. Supreme Court, pp. 6, 8.

The order in question, although permissive in form, is of the kind which may be made the subject of a suit under Sec. 208, Jud. Code, and of which no other court may take jurisdiction. United States v. Atchison, Topeka & Santa Fe R. Co., 234 U. S. 478, 489-90; B. & O. R. Co. v. United States, supra, p. 4. It is only negative orders denying relief which do not support such an action. Procter & Gamble v. United States, 225 U. S. 282; B. & O. R. Co. v. United States, [fol. 40] supra, p. 4. In my opinion, this case is controlled by Skinner & Eddy Corp'n v. United States, supra; Lambert Run Coal Co. v. B. & O. R. Co., 258 U. S. 377; B. & O. R. Co. v. United States, supra. State of Texas v. United States, 258 U. S. 204, cited and relied on as supporting the jurisdiction of this court, has been carefully considered I am convinced that it is not in conflict with the other cases cited, nor with the conclusion now reached. The judgment was rested on the construction of the pertinent sections of the Interstate Commerce Act, including paragraphs added by Sec. 402, Transportation Act of 1920. The holding is merely that these provisions do not include intra-state traffic upon a railroad of the kind and character described in the opinion. Mr. Justice Van Devanter, delivering the opinion (p. 216) says: "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a

branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce." It was held that its independent operation in intrastate commerce was so disconnected from and unaffected by any interstate traffic that, whether it might discontinue its intrastate operations, was wholly outside the interstate commerce law. The determination thereof as between the carrier and the State of Texas did not involve annulling or impairing the order of the Interstate Commerce Commission authorizing the carrier to discontinue its operations, which, under the facts, was interpreted [fol. 41] as being limited merely to interstate business. This distinction still exists in freight and passenger traffic charges, notwithstanding amendments in the Transportation Act of 1920. See Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. Co., 257 U. S. 563; Houston, etc., Ry. Co. v. United States (Shreveport case), 234 U. S. 342.

In the present case, the equipment in question is intended for use by the three carriers indiscriminately in interstate and intrastate traffic, and the bill so alleges. That its greater use will be in interstate commerce is a matter of such notoriety as perhaps to be within my judicial knowledge. Undoubtedly the order is not separable as to the two kinds of traffic and neither the provisions of the Interstate Commerce Act nor of the order itself can be so construed as to limit the same to interstate traffic, leaving the question of the defendant's right to acquire the same or some part thereof for use solely in intrastate commerce to be determined as between the defendant and plaintiff under the local laws of Ohio.

My conclusion is that the United States District Court, constituted and proceeding under the special provisions of the Judicial Code as amended, has alone jurisdiction of this cause of action. It is not to be implied herefrom that the authority of the Public Utilities Commission of Ohio is not required, or that the defendant may enter into the agreement for acquiring this equipment if in excess of its corporate powers conferred by Ohio or other states. The question now determined pertains only to the jurisdiction of the court; and the other questions suggested are proper to be presented to and may be determined by the District Court which alone has jurisdiction. Plaintiff's bill will be dismissed. A certificate that such dismissal is for want of jurisdiction will be issued if requested.

D. C. Westenhaver, Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUSTAINING MOTION TO DISMISS AND DISMISSING CASE—May 21, 1924

This cause having been submitted to the Court on a previous day of this term on defendant's motion to dismiss for want of jurisdic-

tion, on consideration thereof the Court is of the opinion that the motion to dismiss for want of jurisdiction be sustained. And it is further ordered that the case be dismissed without prejudice at plaintiff's costs; to which ruling of the Court plaintiff, by his attorneys, excepts.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 15, 1924

The above named plaintiff, Clarence H. Venner, conceiving himself aggrieved by the final decree made and entered on the 21st day of May, 1924, in the above entitled cause, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Frederick A. Henry, of Snyder, Henry, Thomsen, Ford & Seagrave, No. 914 Williamson Building, Cleveland, Ohio, Solicitors for Plaintiff.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 15, 1924

And now, upon the 15th day of July, A. D. 1924, comes the said complainant, Clarence H. Venner, by his solicitor, Frederick A. Henry, of Snyder, Henry, Thomsen, Ford & Seagrave, No. 914 Williamson Building, Cleveland, Ohio, and in connection with his petition for appeal says that the final decree in said cause is erroneous and against the just rights of said complainant for the following reason, namely:

The court erred in sustaining the motion of the defendant, The Michigan Central Railroad Company to dismiss for want of jurisdiction and in ordering that the cause be dismissed accordingly.

Wherefore the said appellant, Clarence H. Venner, prays that the said decree of the District Court of the United States for the Northern District of Ohio, Eastern Division be reversed and that such directions be given and decree made in respect to the matters herein referred to in favor of this complainant as will revoke said

dismissal for want of jurisdiction, and require said cause to be heard upon its merit, with costs to be taxed.

Clarence H. Venner, by Frederick A. Henry, of Snyder, Henry, Thomsen, Ford & Seagrave, No. 914 Williamson Building, Cleveland, Ohio, His Attorneys.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—July 15, 1924

On petition of the complainant, Clarence H. Venner, by Frederick A. Henry of Snyder, Henry, Thomsen, Ford & Seagrave, his solicitors:

It is ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein on the 21st day of May, 1924, be and the same hereby is allowed, and that a certified transcript of the record in accordance with the rules and practice for the courts of equity of the United States as promulgated by the Supreme Court of the United States November 4, 1912, forthwith be transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be filed in the sum of Two Hundred and Fifty Dollars.

[fols. 46 & 47] BOND ON APPEAL FOR $250—Approved and filed July 17, 1924; omitted in printing

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[fol. 48] CITATION—In usual form, showing service on S. H. West; omitted in printing

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[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGE'S CERTIFICATE—Filed July 15, 1924

Be it remembered that on the 21st day of May, 1924, this cause came on to be heard upon the motion of defendant, The Michigan Central Railroad Company, to dismiss the said suit on the ground that the District Court of the United States for the Northern District of Ohio, Eastern Division, had no jurisdiction as a Federal Court over the subject matter of the cause, and the court upon due con-

sideration of said motion and after hearing the argument of counsel sustained the same on the sole ground that this court had no jurisdiction of said cause as a Federal Court and accordingly directed that a decree be made and entered herein dismissing said suit for want of jurisdiction, and this ruling of the court is hereby certified to the Supreme Court of the United States.

I further certify that the matter in controversy herein, as shown herein, exceeds in value Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

Dated this 15" day of July, 1924.

D. C. Westenhaver, Judge of the United States District Court for the Northern District of Ohio.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—August 14, 1924

On application of plaintiff and for good cause shown it is ordered that the time for filing the Transcript of Record in the Supreme Court of the United States be and it is hereby extended to September 14, 1924.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—Sept. 13, 1924

On application of plaintiff and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Supreme Court be extended to October 13, 1924.

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 15, 1924

To the Clerk:

You are requested to take a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

Transcript from Cuyahoga County Common Pleas Court.
Plaintiff's motion to remand.
Answer.
Memorandum opinion on motion to remand.
Order overruling motion to remand and transferring cause to Equity Docket.
Order to reinstate cause and to allow plaintiff to file amended petition.
Amended petition for injunction and equitable relief.
Defendant's motion to dismiss for want of jurisdiction.
Memorandum opinion on motion to dismiss.
Order sustaining motion to dismiss and dismissing the case.
Petition for appeal.
Assignment of errors.
Order allowing appeal.
Bond on appeal.
Certificate of the district judge certifying the question of jurisdiction.
Citation.
Orders extending time for filing transcript of record.
Clerk's Cert.

You will please certify the foregoing to be printed in accordance with the rules of the Supreme Court of the United States.

Frederick A. Henry, of Snyder, Henry, Thomsen, Ford & Seagrave, No. 914 Williamson Building, Cleveland, Ohio, Solicitors for Appellant.

[fol. 53] We acknowledge service of the foregoing præcipe by copy this 15th day of July, 1924.

The Michigan Central Railroad Company, by S. H. West, Its Atty.

[fol. 54] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

NORTHERN DISTRICT OF OHIO, ss:

I, B. C. Miller, Clerk of the United States District Court within and for said District, do hereby certify that the foregoing pages contain a full, true and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal and the bond on appeal, in accordance with the pr-ecipe for transcript filed herein, the originals of which remain in my custody as Clerk of said Court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, in said District, this 10th day of October, A. D. 1924, and in the 149th year of the Independence of the United States of America.

B. C. Miller, Clerk. (Seal of the District Court, Northern Dist. of Ohio.)

Endorsed on cover: File No. 30,666. N. Ohio D. C. U. S. Term No. 190. Clarence H. Venner, appellant, vs. The Michigan Central Railroad Company. Filed October 20, 1924. File No. 30,666.

In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. 190.

CLARENCE H. VENNER, *Appellant*,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANT.

SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
914 Williamson Building, Cleveland, Ohio,
Solicitors for Appellant.

FREDERICK A. HENRY,
Of Counsel.

In the Supreme Court of the United States

October Term, 1925.

No. 190.

Clarence H. Venner, *Appellant*,

vs.

The Michigan Central Railroad Company.

Appeal from the District Court of the United States For the Northern District of Ohio.

BRIEF FOR APPELLANT.

Snyder, Henry, Thomsen, Ford & Seagrave,
914 Williamson Building, Cleveland, Ohio,
Solicitors for Appellant.

Frederick A. Henry,
Of Counsel.

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Index of Authorities Cited.

In the Supreme Court of the United States

October Term, 1925.

No. 190.

Clarence H. Venner, *Appellant*,

vs.

The Michigan Central Railroad Company.

Appeal from the District Court of the United States For the Northern District of Ohio.

BRIEF FOR APPELLANT.

STATEMENT.

This suit, originally brought in the Cuyahoga County, Ohio, Court of Common Pleas, on November 9, 1922, by the appellant, Clarence H. Venner, a citizen of New York, against The Michigan Central Railroad Company, a citizen of Michigan, was removed by defendant to the District Court for the Northern District of Ohio, Eastern Division, on the ground of diverse citizenship.

There an amended bill was filed (Rec. 13), and thereupon the case was dismissed for want of jurisdiction, on motion of the defendant. Upon the certificate of the district judge, the plaintiff brings this direct appeal.

Plaintiff sued, as a minority stockholder of the defendant, to enjoin the issue of $12,660,000 trust certificates of the "New York Central Lines Four and One-half Per Cent Equipment Trust of 1922," on the grounds, first, that no orders authorizing such issue of certificates and acquisi-

tion of equipment were obtained under the State public service commission laws of New York, Illinois, Michigan and Ohio, and, secondly, that the transaction is an unlawful intercorporate guaranty and loan of credit by the defendant, acting with its natural competitors, The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, under unlawful and monopolistic domination by the former through stock control and interlocking directorates.

The amended bill discloses also the defendant's claim, that the issue of equipment trust certificates is legalized and validated, in both respects, by the order of the Interstate Commerce Commission made *pendente lite* on December 8, 1922, pursuant to the provisions of the Interstate Commerce Act, Section 20 a, (added by the Transportation Act, 41 Stat. L. 494), regulating security issues by railroads engaged in interstate or foreign commerce, and providing in paragraph (7) that "The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein." The district court, agreeing with this theory, predicated the dismissal of the suit upon the disclosures of the amended bill in this behalf.

ARGUMENT.

The amended bill sets forth that each of said companies operates lines of railroad in the States of Ohio, Michigan, Indiana and Illinois, while the defendant also operates lines in New York and the Dominion of Canada, and the New York Central in the same and other states. It further avers that to defendant is appropriated about one-sixteenth of the equipment to be acquired by means of said certificates, and that it purposes (Rec. 15) "to use some or all of the same in the State of Ohio, and parts in each of the other States in which its lines are operated, and that other portions of said equipment will be similarly acquired by said other railroad companies and be used by them within and without the State of Ohio," etc.

The public service commission statutes of New York, Ohio, Michigan and Illinois, cited in the amended bill (Rec. 16), in substance prohibit the issuance by a railroad corporation operating under the laws of any of such States, of stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than twelve months after date thereof, for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service within such State, without the consent, permission and authority of such commission by its order first duly applied for and made, fixing the amount, character and terms of such issue and the purpose to which such issue or any proceeds shall be applied, and making void all issues in contravention of such requirements, and also forbidding such railroads to apply any such issue or its proceeds to any purpose not so specified.

Within the respective boundaries of the States mentioned, these statutes govern the issue of railroad securities and the acquisition of railroad equipment by means

thereof in all cases which are not embraced within the scope of the commerce clause of the Federal Constitution, or which being so embraced, are without the field actually occupied by the legislation of Congress concerning interstate and foreign commerce.

The district court, without evidence, and solely upon the averments of the amended bill, erred in dismissing this case for want of jurisdiction and upon the ground that the jurisdiction exercised by the Interstate Commerce Commission on the same subject matter is exclusive and subject to judicial review only in the manner provided by the District Court Jurisdiction Act (38 Stat. L. 219), viz., "by three judges, of whom at least one shall be a circuit judge."

In *Texas v. Eastern Texas R. R. Co., et al.*, 258 U. S. 204, the defendant railroad was an instrumentality of both interstate and intra-state commerce, and the case involved a similar supposed conflict between a State statute and a clause, verbally identical with the one here involved, of the Interstate Commerce Act (Section 1 (20), 41 Stat. L. 476), which provides that when the Interstate Commerce Commission issues a "certificate that the present or future public convenience or necessity" permits of the abandonment of a line of railroad, "the carrier by railroad may, without securing approval other than such certificate, comply" etc. The first of the two cases there reported together was a suit originally brought in the State court to enjoin a railroad engaged in both interstate and intra-state commerce, from discontinuing the operation of its line for the latter purpose without permission from the state commission, although an order of the Interstate Commerce Commission authorized the absolute abandonment thereof. This Court sustained the right to maintain such a bill.

Declaratory of the general construction of the Interstate Commerce Act (41 Stat. L., 476), it is provided by Section 1, (17) "That nothing in this Act shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intra-state business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act."

Constitutional limitations aside, conflicts of Federal and State statutes regulating commerce by railroad carriers are not reconciled in any uniform manner by the Interstate Commerce Act. On the subjects of railroad consolidation and of rate or service discrimination its language in this respect is uncompromising, viz., "the law of any state or the decision or order of any state authority to the contrary notwithstanding." 41 Stat. L. 481, Sec. 5, (6), (c), and 41 Stat. L. 484, Sec. 13, (4). And authorized consolidations are relieved of all "restraints or prohibitions by law, *State or Federal*, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." 41 Stat. L. 480, Sec. 5, (8).

Significantly variant are the corresponding provisions, previously cited, in respect to the construction, extension, operation and abandonment of lines of railroad, viz., "without securing approval other than such certificate," i. e., other *Federal* approval; or, the like provision here involved in respect to the issuing of securities and the assuming of obligations, "without securing approval other than as specified herein." The two latter classes of orders by the Interstate Commerce Commission are, moreover, generally if not always, purely permissive; whereas those relating to discriminations are compulsory and enforceable, "the deci-

sion or order of any State authority to the contrary notwithstanding."

Section 20 a, (2), of 41 Stat. L. 494, makes it "unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person natural or artificial, *even though permitted by the authority creating the carrier corporation,*" without the Commission's order authorizing the same. This contemplates in appropriate circumstances a conjunctive or dual Federal and State jurisdiction.

Construing all these various clauses and phrases, one with another, it is apparent that if the Federal and State commissions were intended to be limited to mutually exclusive jurisdiction in relation to issues of securities, instead of a double jurisdiction when the case requires, Congress would have said plainly that wherever interstate commerce is substantially involved, even though intra-state commerce is also involved, the lawful orders of the Interstate Commerce Commission shall prevail, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Where interstate and intra-state commerce are so intermingled that Federal control or regulation, when exercised, must be exclusive in order to be effective over the former, then State laws must yield to Federal legislation when Congress elects to occupy the field; or, even without such Federal occupation, whenever a State statute becomes substantially obstructive to interstate commerce.

But wherever separate regulation is reasonably possible, or where Congress manifests no clear purpose to

wrest from the States their previously exercised visitorial and police powers over the corporate instrumentalities of commerce created by State laws, the inference of an absolute ouster of State control should not readily be indulged.

A railroad corporation of the State of Michigan, engaged in both interstate and intra-state commerce, but shorn of all the important elements of its State charter, and equipped instead with entirely new powers and disabilities, engrafted upon it by Federal law and administered by the discretionary orders of a Federal commission, is a grotesque and unwelcome conception, which would deprive a minority stockholder of the benefit of the *Dartmouth College* case rule. He could seldom or never invoke equitable redress of corporate abuses, because there would be no stable test of *ultra vires* conduct.

In the instant case the Michigan Central Railroad Company is authorized by the Interstate Commerce Commission to enter into "a joint and several Equipment Trust Agreement" covering $12,660,000 of certificates, and among other things to "specifically agree to pay the amount of the principal of said certificates and of the dividend warrants belonging thereto representing interest thereon, as such certificates and warrants respectively become due and payable." (Rec. 15). The above amount represents three-fourths of the cost of $16,915,000 of equipment, whereof the defendant is allotted only $1,026,000. The ratio of its risk to its interest is 16 to 1; and a minority stockholder may well object to such a transaction, however well safeguarded the guaranty may be, especially since the defendant's entire capital stock is only $18,736,400.

Under said Section 20 a, (2), "the Commission by order authorizes such issue or assumption" of obligations only if it finds that the proposed indebtedness "is for some lawful object within its corporate purposes," etc. If the

Commission's order approving this Equipment Trust Agreement implies that it found this *ultra vires* guaranty by The Michigan Central Railroad Company to be a "lawful object within its corporate purposes," such finding is not administrative but judicial; nor does the entry of such an order restrict the complainant here, as a minority stockholder, to the mode of redress prescribed by the District Court Jurisdiction Act, 38 Stat. L. 219, and the Commerce Court Act, 36 Stat. L. 539, Secs. 4 and 5. In such case resort may be had to the State and Federal courts in the first instance, because the issue is the validity of laws which control the action of the carrier and hence present a question of general law for a judicial tribunal, and not one competent for an administrative body. *Louisville etc. R. Co. v. F. W. Cook Brewing Co.,* 223 U. S. 70, 84, (Syl. 10).

That the guaranty recited in the amended petition (Rec. 15 and 18) is *ultra vires,* unlawful and void, is evident from the rule of *Louisville etc. Ry Co. v. Louisville Trust Co.,* 174 U. S. 552, 567, where it is said:

> "A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires,* unlawful and void, and incapable of being made good by ratification or estoppel."

See also *Pollitz v. Public Utilities Commission,* 96 O. S. 49, Syl. 4:

> "A railroad corporation which is subject to the laws of Ohio has no authority, express or implied, to enter into a joint contract of guaranty, by which it jointly with other companies guarantees an entire issue or series of bonds, issued by another company of which the Ohio company owns only a portion."

See also the opinion of Taft, J., in *Humboldt Mining Co. v. American Mfg. & M. Co.*, 62 Fed. 356, wherein the present Chief Justice said:

> "The general rule in this country and England is that one corporation is impliedly prohibited from guaranteeing the contract or debt of another."

In *In re Johnson Foreign Patents Co., Ltd.*, L. R., 2 Chancery Division 234 (1904), a celebrated English case often cited, the court held and decreed,

> "that the debentures in so far as they purport to effect a joint borowing by the three companies are *ultra vires* and void; but that the respective debenture holders are entitled to hold the debentures as a good security against each company to the extent to which the proceeds of the issue reached each company."

The defendant contends not only that said Section 20 a, sets aside conflicting provisions of the State public service commission acts but that the order of the Interstate Commerce Commission authorizing this issue of Equipment Trust Certificates clothes the Michigan Central Railroad Company with corporate power where necessary to supply deficiencies or to countervail denials of power in the State corporation laws to which it is subject. Such a delegation by Congress of discretionary legislative authority to a commission is inadmissible under the grant and limitations of legislative power contained in sections 1 and 8, Article I of the Federal Constitution.

The same contention also contravenes at least two other clauses of the Constitution, viz., the tenth amendment, which provides that "the powers not delegated to the United States by this Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people"; and the fifth amendment, which provides that no person shall be deprived of life, liberty or prop-

erty without due process of law, in that the plaintiff is thus deprived of his right as a minority stockholder to the protection of the laws of the states under which the defendant was incorporated and in which it operates.

The decree of dismissal of the amended bill and of the suit, for want of jurisdiction, should be reversed on the authority of *Texas v. Eastern Texas R. R. Co., et al.*, 258 U. S. 204, cited *supra*.

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In the Supreme Court of the United States

October Term, [illegible]

No. [illegible]

[illegible],
Appellant,

vs.

The Michigan Central Railroad Company.

Appeal from the District Court of the United States
for the Northern District of Ohio.

BRIEF FOR APPELLEE.

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Cases Cited.

In the Supreme Court of the United States

October Term, 1925.
No. 190.

Clarence H. Venner,
Appellant,

vs.

The Michigan Central Railroad Company.

Appeal from the District Court of the United States For the Northern District of Ohio.

BRIEF FOR APPELLEE.

STATEMENT.

In 1922 three of the New York Central lines or system of railroads, the New York Central, Michigan Central and Cleveland, Cincinnati, Chicago & St. Louis, jointly executed an equipment trust agreement in the conventional form, under which it was proposed to issue equipment trust certificates and use the proceeds when sold for the acquisition of certain locomotives to be employed by them indiscriminately in intrastate and interstate commerce.

Clarence H. Venner as a stockholder of the Michigan Central filed a suit in the Common Pleas Court of Cuyahoga County, Ohio, to enjoin his corporation from carrying out this arrangement, on the sole ground that it constituted an illegal lending of defendant's credit to the other two railroad companies, the trustee and holders of the certificates (Rec. 3). The case being removed to the fed-

eral court for diversity of citizenship, the defendant answered, setting up that all that was done or proposed was under the sanction of the Interstate Commerce Commission, which on November 8th, 1922, had duly issued its order to that end; and that the district court was without jurisdiction of the cause (Rec. 10).

Thereafter Mr. Venner filed an amended petition setting up as additional ground of complaint the omission of the railroads, parties to the trust, to secure the consent of the Public Utilities Commissions of Michigan, Ohio and other states to the issuance of the equipment trust certificates; and further setting out at length that the defendant claimed the right to proceed "by virtue of an order entered by the Interstate Commerce Commission on November 8, 1922, permitting the said defendant to make the said agreement and approving the same"; and that it claimed that Sec. 20a of the Act to Regulate Commerce as amended "dispensed with the necessity of its obtaining the consents of the said state commissions."

The amended petition then denied that Sec. 20a had the effect claimed, and averred that to so construe it would bring it into conflict with the Tenth Amendment to the Constitution of the United States (Rec. 15-18).

Thereupon defendant moved to dismiss the cause for want of jurisdiction, and because the United States, an indispensable defendant, was not sued. The district court sustained this motion (Rec. 21-22) and certified the jurisdictional question (Rec. 23-24), which is the sole question before this Court. The lower court considered no other, and was careful to make that plain in its opinion (Rec. 21). The bulk of appellant's brief consists of a discussion of the merits of the controversy and very little is said of the question of jurisdiction.

ARGUMENT.

The amended petition affirmatively shows that the defendant was acting under authority of an order of the Interstate Commerce Commission, and avers (Rec. 16):

> "Plaintiff further says that defendant seeks to justify its course in entering into and making said Equipment Trust Agreement, providing for the issue of certificates as aforesaid, by virtue of an order entered by the Interstate Commerce Commission on November 8, 1922, permitting the said defendant to make said agreement and approving the same. Said order of the said Interstate Commerce Commission is claimed by the defendant to have been made under Section 20-a of the Interstate Commerce Act known as the Federal Railroad Act of 1920, Subsection (2)."

The subsection or paragraph of the act referred to reads as follows:

> "(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate

purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Other portions of the section read:

"(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modification and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2)."

* * * * *

"(6) Upon receipt of any such application for authority, the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

"(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

The amended petition avers (Rec. 14) that the equipment trust certificates mature annually from September 1, 1923, to 1937, inclusive; that their issuance "is in substance and legal effect and in fact, the issuance of evidences of indebtedness by the defendant company and its associates" (Rec. 16); that the equipment is to be leased by the trustee to the carriers, and upon payment of the certificates becomes their property (Rec. 14-15); and that the net effect of the arrangement is the guaranty by defendant of the obligations of the other companies, contrary to the laws of Ohio and Michigan (Rec. 18). The allegations of the pleading bring the securities and obligations to be issued and assumed clearly within the provisions of Sec. 20a. Prior to the enactment of this law equipment trust certificates such as so described were held to be within the law of New York (which is similar to that of Ohio and Michigan) requiring prior approval of the local commission; they were held to be evidences of indebtedness. *People vs. N. Y. C. & H. R. R. R. Co.*, 138 App. Div. 601. Affirmed 199 N. Y. 539.

The prayer of the amended petition was for an injunction preventing defendant from carrying out the terms of the equipment trust agreement and availing itself of the authority given by the order of the commission. In effect, the commission's order was sought to be annulled and set aside.

This Court has decided in *Lambert Run Coal Co. vs. B. & O. R. R. Co.*, 258 U. S. 377, that such a suit can not be

entertained by a state court, nor on removal, by a federal district court. That case was commenced in a state court to enjoin the carrier from observing a rule prescribed by the Interstate Commerce Commission for the distribution of coal cars; and was removed to the district court, which declined to dismiss for want of jurisdiction. Its decree having been reversed by the circuit court of appeals, this Court said at p. 381, 382:

> "The decree of the district court was properly reversed; but we are of opinion that the circuit court of appeals had no occasion to pass upon the merits of the controversy, and that the direction should have been to dismiss the bill for want of jurisdiction, and without prejudice. The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission, or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was in effect sought. The appellate court was therefore correct in holding that, in such a suit, an injunction of the district court could be granted only by three judges.
>
> "But there are, in addition, two fundamental objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a Federal district court. Judicial Code, Sections 208, 211; Act of October 22, 1913, chap. 32, 38 Stat. at L. 208, 219; *Illinois C. R. Co. v. Public Utilities Commission,* 245 U. S. 493, 504; *North Dakota ex rel. Lemke v. Chicago & N. W. R. Co.,* 257 U. S. 485; *Texas v. Interstate Commerce Commission,* 258 U. S. 158. The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively

acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the district court could not acquire jurisdiction over them by the removal. The jurisdiction of the Federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the Federal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction."

The fact that Mr. Venner is not shown by the amended petition to have been a party to the proceeding before the Interstate Commerce Commission in which the order complained of was secured is not important. He is a stockholder of the defendant and as such had a direct interest in the matter and was no doubt entitled to intervene before the commission. His amended petition sets out that what is proposed to be done under the order will cause him as a stockholder irreparable damage.

This Court said in *B. & O. R. R. Co. vs. U. S.*, 264 U. S. 258, 268:

> "No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the commission, but did not do so, have been allowed to maintain such suits where the requisite interest was shown. *Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S. 42; *Skinner & E. Corp. vs. U. S.*, 249 U. S. 557, 562."

In other cases similar to this, Mr. Venner's counsel has contended that a permissive order of the Interstate Commerce Commission such as this is can be enjoined by

a state court, notwithstanding the decision in the *Lambert Run Coal Co.* case, *supra.*

The order authorizing the issuance of the equipment trust certificates is not a negative order such as was held in *Proctor & Gamble Co. vs. U. S.*, 225 U. S. 282, not to be subject to attack in the courts. It is affirmative, although permissive.

Permissive orders have been held subject to attack under Secs. 208 and 211, Judicial Code, in many cases. In *State of Texas vs. U. S.*, 258 U. S. 204, this Court reviewed a decree dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission which sanctioned the discontinuance of the operation of a railroad. The order was granted under pars. 18, 19 and 20 of Sec. 1 of the Act to Regulate Commerce as amended by Transportation Act 1920, and was purely permissive. This was the second case reported, No. 563. A permissive order was involved in *U. S. vs. Atchison, Topeka & Santa Fe Railroad et al.*, 234 U. S. 476. The commission's order authorized transcontinental carriers to charge higher rates for short hauls than for longer hauls to Pacific coast terminals, and it was contended that it was of a negative character and not subject to review. But this Court held otherwise. The decision in *B. & O. vs. U. S., supra,* which involved an order of the commission secured by The New York Central Railroad Company authorizing it to acquire the stock of The Chicago Stock Yards Railroad Company, is conclusive. It is said on p. 263:

> "Nor would the further fact that the order is permissive preclude review if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited. * * * A suit will lie to set

aside an order granting such authority, and to enjoin action by the carrier thereunder." And at p. 264:

> "Here the order complained of is an affirmative one. That is, it grants the relief sought."

All that has been said above would appear to be admitted, as the brief of the appellant concludes:

> "The decree of dismissal of the amended bill and of the suit, for want of jurisdiction, should be reversed on the authority of *Texas vs. Eastern Texas R. R. Co. et al.*, 258 U. S. 204."

The first of these cases, No. 298, was brought in a state court to enjoin the railroad from ceasing to operate in intrastate commerce. Pending the suit, the company's application to the Interstate Commerce Commission for an order permitting it to abandon its line was granted. The case being removed, the federal court held that an answer setting up such certificate of authority constituted a complete defense, and dismissed the suit.

Whether the suit, which related solely to the intrastate operations of the Texas railroad, involved setting aside the order of the commission, depended on the scope of such order and whether when properly construed it affected intrastate commerce at all. In the opinion by Mr. Justice Van Devanter it is said:

> "The road lies entirely within a single state, is owned and operated by a corporation of that state, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or crip-

ple the main line, and thereby affect its utility or service as an artery of interstate and foreign commerce.

"If Pars. 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. * * * They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act, they are to be read in connection with it and with other amendments of it. As a whole, these acts show that what is intended is to regulate interstate and foreign commerce, and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce.

"These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."

In other words, the Texas railroad and its traffic were of such character that intrastate operations could be continued or abandoned as might seem best to the local authorities, without any interference with or burden upon interstate commerce resulting in either case.

As was said herein by the district court, opinion (Rec. 21):

> "It was held that its independent operation in intrastate commerce was so disconnected from and unaffected by any interstate traffic that, whether it might discontinue its intrastate operations, was wholly outside the interstate commerce law. The determination thereof as between the carrier and the State of Texas did not involve annulling or impairing the order of the Interstate Commerce Commission authorizing the carrier to discontinue its operations, which, under the facts, was interpreted as being limited merely to interstate business."

But such is not the situation in the case at bar. This is not a suit to enjoin the execution of the equipment trust agreement, as it may affect intrastate commerce alone. The amended petition avers that the locomotives to be procured by means of the trust are to be used indiscriminately in both classes of commerce, and, as the court below said, judicial notice will probably be taken that the greater use will be interstate. The order provides for the acquisition of all the equipment and is not susceptible to a construction making it inapplicable to intrastate commerce, as was true in the Texas case. Just as the use of the equipment will be indiscriminate in both classes of commerce, so the order is indivisible as between the two, and must stand or fall as a regulation of interstate commerce, incidentally affecting intrastate traffic to a certain extent.

Appellant's contention that the construction placed by the court below upon the order of the commission is not warranted under any view of Sec. 20a which does not make the latter unconstitutional, is merely another way of saying that such order is void because of the invalidity of the law

under which it was made. That proposition is neither supported by any authority, nor is the question before this Court, which is only concerned with the matter of jurisdiction. Whether the order is invalid because of the unconstitutionality of the law or for any other reason, can only be determined in a suit brought originally in the federal court.

That the decree of dismissal was correct and must be affirmed is,

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 190.—October Term, 1925.

Clarence H. Venner, Appellant, *vs.* The Michigan Central Railroad Company.	Appeal from the District Court of the United States for the Northern District of Ohio.

[April 26, 1926.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is an appeal from a decree of a federal district court dismissing a suit for want of jurisdiction. The suit was begun in a state court and then removed into the federal court, on the defendant's petition, by reason of the diverse citizenship of the parties. Want of jurisdiction was adjudged because the court was of opinion that the suit was essentially one to annul or set aside an order of the Interstate Commerce Commission made under section 20a of the Interstate Commerce Act, c. 91, 41 Stat. 494; that the United States was a necessary defendant and had not consented to be sued in a state court; and that the removal did not give the federal court jurisdiction when the state court had none.

A short description of the suit as displayed in the plaintiff's amended bill will suffice to show its nature. The plaintiff is a minority stockholder of a railway company which owns and operates an interstate railroad, and that company is the sole defendant. The purpose with which the suit is brought is to enjoin the defendant company from carrying out an agreement with two other railroad companies under which the three, collectively styled "New York Central Lines," are to acquire a large number of locomotives for use on their respective roads in both interstate and intrastate commerce; are to obtain money to pay for this equipment by issuing certificates, payable at intervals during a period of 15 years, with semi-annual dividend warrants representing interest; and are to covenant jointly and severally to pay rentals for the equipment sufficient to pay the certificates and dividend warrants as they mature. On application by the three companies pursuant

to section 20a the Interstate Commerce Commission, after notice and investigation, made an order approving the agreement and authorizing the acts contemplated therein. The order was made the day before the suit was begun.

The plaintiff alleges in his amended bill that to issue the certificates and provide for their payment in the manner proposed will be in violation of the laws of the State wherein the defendant company was incorporated and of the other States into which its road extends, unless the approval of designated agencies of those States be secured; that such approval has not been and is not intended to be secured; and that the defendant company is relying on the order of the Interstate Commerce Commission and is proceeding to carry out the agreement as approved by that order. He also alleges that the order and the provisions of section 20a, under which it was made, transcend the limits of federal power and encroach on the power of the States before named. The prayer is that the defendant company be enjoined from carrying out the agreement, notwithstanding its approval by the Interstate Commerce Commission under that section.

The defendant challenged the court's jurisdiction by a motion to dismiss on the grounds before stated, and it was on consideration of that motion that the decree of dismissal was entered. The decree was entered and the present appeal was allowed prior to the change made in our appellate jurisdiction by the Act of February 13, 1925.

By section 20a the Commission is empowered to entertain an application by any carrier by railroad engaged in interstate commerce for authority to issue bonds or other evidences of indebtedness, or to assume obligations or liabilities as a lessor or lessee, or as a guarantor or surety of another carrier; and is further empowered, after notice to "the Governor of each State in which the applicant carrier operates" and on due investigation, to grant or refuse such authority in whole or in part, and thereafter, for good cause shown, to make such supplemental orders in the premises as it may deem necessary or appropriate. The section also provides: "(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 380, 382. Such a suit must be brought against the United States as the representative of the public and may be brought only in a federal district court. Judicial Code, secs. 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 219; *Illinois Central R. R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493, 504-505; *North Dakota* v. *Chicago & Northwestern Ry. Co.*, 257 U. S. 485, 487; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 164; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*. *supra*. That the order is not mandatory but permissive makes no difference in this regard. *Chicago Junction Case*, 264 U. S. 258, 263. And as the state court was without jurisdiction the federal court acquired none by the removal. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, *supra*.

The plaintiff cites *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, and *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, as showing jurisdiction below; but neither case is open to such an interpretation. In the first no order of the Commission was involved either directly or indirectly. In the second this Court dealt in a single opinion with two distinct proceedings. One was a suit to set aside an order of the Commission and was brought against the United States and a railroad company in the proper federal district court. The other was a prior and related suit brought in a state court against the railroad company and removed into another federal district court before the order was made by the Commission. Afterwards, when the order was made, its interpretation and operation were drawn in question in that suit. The question of jurisdiction with which we are concerned here was not raised there, and there is doubt that it could have been.

We hold that the dismissal for want of jurisdiction was right.

Decree affirmed.